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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| JOANNE HOEPER,<br>Plaintiff and Respondent,<br>v.<br>CITY & COUNTY OF SAN FRANCISCO,<br>Defendant and Appellant. | A151824, A152204, A152539<br><br>(City & County of San Francisco Super. Ct. No. CGC15543553) |

A jury found Joanne Hoeper was terminated by the San Francisco City Attorney's Office for engaging in protected whistleblowing. The City and County of San Francisco (the City) contends the trial court erred when it found the City waived the attorney-client privilege and therefore allowed Hoeper to introduce evidence of her efforts to investigate alleged fraudulent activity in the City Attorney's Office (CAO); that there was no substantial evidence to support the jury's finding that Hoeper was terminated in violation of California's whistleblower and false claims statutes; that Hoeper failed to mitigate her damages; and that an award for emotional distress was excessive and unsupported by substantial evidence. None of these arguments is meritorious. Accordingly, we affirm the judgment.

## BACKGROUND

The following evidence is described in the light most favorable to the judgment in accord with the standard for substantial evidence review. (Discussion Section II, *post*; see *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188 (*Wilson*).)

### I. Hoeper's Career With the CAO

In 1994 Hoeper was hired by the CAO as Chief of Complex Litigation, a supervisory position on the CAO's Trial Team. In 2000 she was promoted to Chief Trial Deputy and joined the CAO Executive Team. In 2002 Dennis Herrera was elected City Attorney and retained Hoeper in both positions.

In May 2011 Hoeper was recruited for a senior position with newly-elected Attorney General Kamala Harris. Hoeper loved her job and saw herself working for the CAO for the rest of her career, but she realized this was an opportune time to ask Herrera about her future at the CAO "so that I could see what my options were." Herrera assured Hoeper she had a future in the office. So, she turned down the opportunity with Harris.

### II. The Sewer Investigation

In December 2011, Hoeper was informed the FBI had received tips about a scheme involving fraudulent claims for sewer laterals allegedly damaged by the roots of City-owned trees. That same month a San Francisco District Attorney's Office investigator reported a similar complaint. The tips, and Hoeper's subsequent investigation, focused on the CAO's Claims

Unit, which investigates and evaluates pre-litigation claims filed against the City.

Individual homeowners are responsible for maintaining the upper sewer laterals which run from the house under the sidewalk to the property line. Homeowner claims for upper laterals damaged by City-owned trees are paid from the San Francisco Department of Public Work's (DPW) general fund and recorded under its "cause code 1020" for tree maintenance. In contrast, the City's Public Utilities Commission (PUC) owns and is responsible for maintaining the lower laterals that continue from the curb to the main sewer line. Lower lateral repairs are normally handled by DPW crews or contractors and paid out of the PUC budget under cause "code 9103" for "sewer-property damage."

Hoeper reviewed the City's history of paying to replace sewer laterals due to intrusion by City-owned trees and, with CAO investigators George Cothran and Dave Jensen, launched an investigation into the Claims Unit's handling of such claims. CAO attorney Matthew Rothschild supervised the Claims Unit and personally reviewed and approved all claims before they were paid. Rothschild was a personal friend of Herrera's for over 25 years. He had worked on and donated to Herrera's political campaigns and was part of Herrera's advisory "kitchen cabinet." Rothschild supervised Claims Unit Assistant Chief Michael Haase, who investigated and could approve all claims against the City for damaged sewer laterals.

Hoeper found a number of things that alarmed her. The amount the City was paying on claims for damaged sewer laterals had increased dramatically over 10 years. Claims listed under cause code 1020 "were huge numbers and they kept going up and up, I think, hitting as high as from 4.4 or 4.5 million dollars in 2010. [¶] . . . [¶] It was a lot of money, and it was something that we—we had no idea that that money was being spent." Between 2002 and 2010 the City's yearly payments on tree maintenance claims had ballooned from $141,974 to $4,062,704. During the same period the City paid a total of $4,840,317 for claims under cause code 9103. In addition, Haase frequently processed claims for lower lateral repairs through the CAO claims process and charged them to the DPW under the tree maintenance cause code 1020. Moreover, numerous claims were paid based on releases signed by plumbing companies rather than property owners, who were the only parties with standing to release claims against the City. Such releases were legally invalid and exposed the City to significant liability.

Hoeper and her investigative team determined the City's practice of replacing upper laterals damaged by root intrusion from City trees, known among some DPW and PUC staff as " 'Haase's tree root program' " was legally and factually suspect. Professionals in the field generally agreed that tree roots exploit existing cracks in sewers caused by age, settling or other reasons, but do not cause sewer damage. "Tree roots are evidence of broken sewers, not the cause of the breaks." This view was confirmed by the City's arborist, DPW personnel, a DPW tree

maintenance consultant, and the experience of other cities, including Oakland, Los Angeles, Santa Monica and Sacramento, that did not pay for root damage to sewers. Further, the head of the CAO's Construction Team confirmed that the Claims Unit's practice of using the CAO claims process to pay for lower lateral repairs bypassed the public bidding process requirements under the City's Administrative Code.

Hoeper learned that a number of plumbing companies were exploiting the City's tree root program. She explained in a July 18, 2012 draft investigation report (Report) that certain plumbing companies used the DPW's listing of streets with City-owned trees to solicit homeowners. "We have documented many instances in which plumbing company employees knock on doors and tell homeowners that they have roots from City trees in their sewers and that the City will pay to replace the sewers. The plumbing companies sometimes imply that they work with or for the City. Homeowners who are not having sewer problems and who question why they need a new sewer are told that the City automatically pays for a new sewer whenever roots are discovered. Homeowners are told that the companies will handle all of the paperwork. (In fact, many of the claim forms in the files are fil[l]ed out by someone other than the claimant. The claimant simply signs the document.) Homeowners are told to expect a check from the City and that they can either pay the plumbing company when they receive the City check or they can simply turn over the check to the company."

One plumbing company in particular, Drainbusters, "appear[ed] to exist solely to exploit the City's 'tree root program.' During a two year period, Drainbusters obtained 93 plumbing permits in San Francisco. All but two of these permits resulted in claims to the City and each of these 91 claims was paid." Between 2010 and 2012 Haase approved $852,688 in payments to Drainbusters. But other plumbing companies were involved in similar activities. These companies would go door-to-door in certain areas or leave flyers, telling homeowners there were roots in their sewer lines and that they could replace the lines for free. Others identified themselves simply as plumbers who happened to be in the area. Once a homeowner indicated interest in a free sewer replacement, these rogue plumbers would help fill out the claims and work with the Claims Unit to get it approved. Drainbusters' owner Rhiad Khano told the jury he paid Sidney Silverberg a 30% commission to solicit homeowners in neighborhoods with City-owned trees. Khano described the CAO claim form as a "brochure" for the "sewer program."

The jury heard from four San Francisco residents about their experiences with rogue plumbers. Rosemary Woo saw Silverberg poking around her and her neighbor's sewer vents. When she questioned him, he said there were tree roots in her sewer and that he could fix it without costing her a penny because the City would pay. Silverberg put a camera into Woo's sewer and asked her to look, but then claimed the camera was not working. He would not produce city identification upon Woo's request, and drove away when she threatened to call the police.

Woo reported the encounter to the District Attorney's Office, which forwarded her letter to the Claims Unit. Haase acknowledged receiving Woo's complaint but never acted on it.

Two other City residents testified about plumbing companies who replaced their sewers without permission and then pressured and harassed them to sign claim forms authorizing payment by the City or to sign over City checks for the work. Another homeowner was solicited to replace a sewer lateral at the City's expense. The owner was unhappy with the work and refused to sign a City claim form, but later learned the plumbing company's owner signed the claim form himself and received payment from the City.

Haase and Rothschild knew as far back as 2007 that there were problems with rogue plumbers aggressively soliciting homeowners to replace upper sewer laterals. Haase felt such conduct was "unethical but not illegal." In the spring of 2011 he created and Rothschild approved a declaration form for property owners to sign and submit with their claim, stating "I have been experiencing sewer backups at my property. I am requesting that the City and County of San Francisco investigate the cause of my sewer problems. I have not been approached by anyone asking me or tell to claim [sic] I have had past sewer problems." But the declaration had no practical effect. Companies continued to solicit homeowners and simply instructed the homeowners to sign the declaration along with the claim form. Haase continued to approve virtually every claim without additional scrutiny. Hoeper's Report observed: "The fact that Haase

required the declaration for certain claims but did not alter how he handled those claims could give rise to an inference that his goal was not to halt the fraudulent practices but rather to 'paper' the claims files and thereby reassure anyone who might review them."

Hoeper's report also flagged concerns about the rates charged by plumbers (and reimbursed by the City) for sewer replacements. Haase told Hoeper that the "going rate" for a new upper lateral was $7,000, but the City consistently paid Drainbusters close to $10,000. Hoeper also found it suspicious that many of the claims were for just under $10,000. "It seems unlikely that the cost would be so consistent across the City, since factors such as the depth of the sewer, the number of feet of sewer that need to be replaced, and the number of concrete sidewalk flags involved can dramatically affect the cost of replacing an upper lateral."

The Report noted other indications of possible wrongdoing. Haase helped a friend who provided him with Giants tickets substantially below market value to replace his lower sewer lateral at City expense. Hoeper also questioned the propriety of Haase referring work and approving payments to Annuzzi Concrete, which employed and had provided a letter of recommendation for Haase's son.

### III. Hoeper Briefs Herrera

In April 2012, Hoeper briefed Herrera on her preliminary findings and received his approval to continue investigating. In May 2012, she met with him again to report on her investigation.

She and the investigators "told Dennis Herrera that we thought that the work on the upper laterals was unnecessary, and therefore we characterized it as fraudulent. [¶] We talked about the claims paid for the lower lateral repairs and told Dennis Herrera that we believed those repairs were—using the claims process for that sort of repair was unlawful because it violated the City's public contracting rules. [¶] We identified some issues of concern with DPW and the PUC employees that we wanted to follow up on, and we listed a number of concerns with the City Attorney Claims Bureau employees."

Hoeper and her team also briefed Herrera about Drainbusters and other companies soliciting City-funded sewer replacements and holding themselves out as City employees or affiliates; about claims and releases submitted by plumbers rather than property owners; and about their suspicion that Claims Unit personnel might be steering sewer work to friends or colleagues. She mentioned Haase's connection to Annuzzi Concrete. And she conveyed her concern that Haase and Rothschild were approving claims "despite what we considered were clear indications of fraud."

Herrera authorized Hoeper to continue the investigation. They agreed not to inform Rothschild about the investigation at that time. Cothran testified, "[w]e were fearful that [Rothschild's] reaction might be counterproductive, that he would get very upset or that he might even try and obstruct the investigation out of a protective instinct about Mike Haase or for whatever reason."

Herrera later decided it was time to tell Rothschild about the investigation. After Herrera met with him, Rothschild burst in on Hoeper, Jensen and Cothran. As described by Cothran, he was "extremely upset. [¶] . . . [¶] He was shaking. He was trembling. He appeared to be—very emotionally escalated, extremely angry. [¶] . . . [¶] His physical presentation, tone of his voice his voice was quavering. [¶] He was loud. He was accusatory. He was emotionally out of control." Rothschild threatened the investigative team. He said they'd "be sorry that we were doing this, that he wasn't going to allow us to hurt Mike Haase, he wasn't going to allow this investigation to continue, he would not let this happen, and we'd regret this, and we'd be sorry." Hoeper testified that Rothschild "was just screaming at me, and he—he was bright red. [¶] . . . [¶] I mean, he was—virtually lifting off the ground[,]" "vibrating he was so angry, and he was yelling." He said " 'You'll be sorry. I won't stand for this. You don't know what you're doing. You're wrong. I'm going to go on a hunger strike. You can't—this can't go on.' " His outburst lasted some 15 minutes.

On May 17, 2012, Hoeper, Herrera, Chief Deputy Attorney Therese Stewart and the investigators briefed PUC head Ed Harrington and DPW head Mohammed Nuru on their findings to date. Harrington and Nuru were "understandably upset" and expressed concern that the CAO's Claims Unit had approved suspect claims. Harrington said to Herrera, " '[y]ou're the City Attorney's Office. You're supposed to be risk managers, not paper pushers.' " Nuru and Harrington issued a written directive

that no sewer lateral claims were to be paid through the CAO without their personal authorization.

In June 2012, Stewart drafted a memo outlining questions for the investigators to ask Haase, including whether he "ha[d] any idea and has he made any effort to track the amount spent through claims on tree root sewer issues? Is he aware that it has dramatically increased over time? [¶] . . . [¶] Why did he pay the claims submitted by plumbers (and accept releases signed by plumbers) as opposed to homeowners? [¶] . . . [¶] To whom, if anyone, did he report in doing this work, and what did he report to them? Is there any documentation of his communication with superiors about this work? [¶] . . . [¶] Why was he not concerned when [homeowners] reported to him that they had not authorized work and that plumbers were pressuring them to do it or even doing the work without permission? Did he discuss it with anyone? If not, why not? [¶] . . . [¶] Did it occur to him that by using the claims process to get this work done, he and the clients were violating the competitive bidding laws?"

Haase was interviewed twice, the second time on June 28. On June 29, he emailed Rothschild that it felt terrible to have his honesty called into question and thanked Rothschild for his support: "I truly appreciate you for believing in me." Rothschild responded, with a copy to Stewart and blind copy to Herrera, "Of course I believe in you, Mike. [¶] We are a great team."

The following day, at Rothschild's request, Stewart called Haase to ease his mind. She told him " 'nobody has concluded that you violated, you know, that you've done anything criminal.

To my knowledge, you know, there's not evidence of criminality. We're getting close to finishing the investigation. Bear with me. . . . Let's finish it out.' " After the call, Haase emailed Rothschild that Stewart was "1st Class," "quite sincere & allowed me to finally feel trusted."

On July 3, 2012, Stewart told Hoeper that Herrera "is wanting us to finish this up and keeps pushing me to get it done." In a July 9 email, she told Hoeper that she instructed Jensen to "work up a 2 page summary of what we did in the investigation and basic findings—not a blow by blow but a summary. I envision combining this with your bullet points to create a memo for [Herrera]. Are you able to get me your bullet points by end of day tomorrow? . . . Please be sure to include in your bullets not only the practices that pose a problem and the changes we recommend, but whether in your view there are important questions that remain unanswered and whether you recommend that more investigation should be done and if so, what further investigation we should do. Thanks." Hoeper told Stewart the proposed timeline was inappropriate given the severity of what was shown in the investigation. Stewart "pushed back a little bit" but "eventually called back and said that I should go ahead and write up . . . a preliminary report" by July 18.

On July 18, 2012, Hoeper turned in her 27-page "Draft Report of Investigation." She described the fraudulent practices of the "cowboy plumbers," Haase's practice of accepting and preparing releases for claims signed by the plumbing companies rather than property owners, "significant evidence" that claims

were paid to replace sewers that did not need replacement, and evidence that the City was paying an inflated rate for sewer replacements, possibly as a result of an agreement among the plumbing companies. Hoeper explained how the Claims Unit's handling of lower lateral repairs violated the City's public contracting laws. She reported the need for further investigation to determine if Drainbusters had been "tipped off" about the investigation by City employees. She also reported that Haase admitted he knew about the rogue plumbers' activities but failed to act on complaints, report what he knew, or take effective steps to stop them.

The Report also flagged questions about Haase's dealings with Annuzzi Concrete and the friend who sold him baseball tickets. More generally, it raised concerns about a failure of oversight at the CAO. "Haase was able to implement his 'tree root program' because he was essentially unsupervised. No one at the City Attorney's Office understood his approach to sewer claims. There was no meaningful review of his work product or his handling of specific claims." Rothschild was criticized for signing off on sewer claims without adequate review or oversight.

Hoeper's Report clarified that the investigative team found no evidence City employees were receiving kickbacks or otherwise engaging in corrupt practices. "Haase, and the lower level DPW and PUC employees we have spoken to who work with Haase, all tell a consistent story that can best be characterized as a 'conspiracy of expediency'—in other words, they created their own 'work arounds' outside of established City procedures in

order to accomplish what they believed to be commendable goals. We do not have evidence at this point that contradicts this narrative[,] but we have not done enough investigation to say with confidence that City employees have not been involved in systemic corruption."

Hoeper identified lines of further inquiry. Those included discussions with Haase; investigation of the most active plumbing companies and their connections with City employees; interviews with other CAO, DPW and PUC employees with knowledge about the sewer claims; examination of Haase's documents and emails on the DPW servers; review of his phone records; investigation into whether plumbing companies were inflating their charges; interviews with Sidney Silverberg and other Drainbusters employees; and the connection between Haase and Annuzzi Concrete.

Two days after submitting her Report, Hoeper went to Rothschild's office to discuss the investigation. Rothschild threw her out. He said, " 'You handled this all wrong. I don't trust you,' " and "Get out of my office. I don't want to ever talk to you about this again." At that moment, Hoeper testified, "[i]t dawned on me for the first time that I was going to pay a price for blowing the whistle on—what was going on in the Claims Unit. [¶] . . . [¶] Because of—the—the way that Mr. Rothschild—Matthew was speaking to me was cold, and—and I just got a chill, and—and it finally dawned on me that there would be consequences for blowing the whistle."

On July 24, Hoeper, Cothran and Jensen met with Herrera and Stewart to discuss the Draft Report. Herrera said he would follow its recommendations " 'and get to the bottom of this.' " He asked for a follow-up memo listing the remaining "must do, should do, could do" tasks, which Cothran, Hoeper and Jensen provided on July 30, 2012.

**IV. Hoeper is Transferred and Terminated**

On July 25, 2012, Herrera told Hoeper he was removing her as Chief Trial Deputy. He gave her the choice of being immediately fired from City employment or working at the District Attorney's office for 18 months, until the beginning of Herrera's next term as City Attorney.

Hoeper said, " 'Dennis, where's this coming from? Why are you doing this? And I think it's because of the sewer investigation, and I think this idea of going to the District Attorney's office is to sort of get me gone so that I'm not going to raise any issues about—about the sewer investigation.' " " You have—you had an obligation. I mean, I've been working with you for 10 years now. You have—it's only fair for you to have given me a heads-up about this.' " She reminded Herrera she had turned down the opportunity to work for Harris because he had reassured her about her future in the CAO.

Hoeper ultimately accepted a position with the District Attorney's Special Prosecutions Unit. Although she would be working for the District Attorney, the CAO would continue to pay her salary. Her last day at the CAO was August 17, 2012. Herrera terminated Hoeper's employment with the District

Attorney after he began a new term as City Attorney in November 2013. Her last day was January 7, 2014.

Investigator Jensen testified that the sewer investigation largely stopped once Hoeper left the CAO. After he and Cothran submitted their July 30 memo proposing next steps they heard nothing about the investigation for six months. Then, in February 2013, Herrera called Cothran "out of the blue" after the mayor and Board of Supervisors received a constituent complaint about Drainbusters. At that point, Herrera and Stewart authorized the investigators to look into whether plumbing contractors were inflating the value of their claims.

Hoeper filed a government tort claim, followed by a complaint asserting retaliation claims under Labor Code section 1102.5 and Government Code section 12653. After a 13-day trial the jury returned a verdict in Hoeper's favor. It awarded her $601,630 for past lost earnings (doubled pursuant to Government Code section 12653, subdivision (b)), $136,318 for future lost earnings, and $1,291,409 for emotional distress, mental anguish and humiliation, for a total award of $2,630,987. The court denied the City's motions for new trial or judgment notwithstanding the verdict on the issues of noneconomic damages and failure to mitigate and awarded Hoeper $2.4 million in attorney's fees. The City filed these timely appeals, which we consolidated for briefing, argument and decision.

## DISCUSSION

### I. Attorney-Client Privilege

#### A. Background

Hoeper filed her claim for whistleblower retaliation with the City and the California Labor Commissioner on July 1, 2014. On September 2, the City filed a 10-page single-space response to Hoeper's claim. The response asserted, in essence, that the City Attorney decided to replace Hoeper years before the sewer investigation. Her investigation turned up no evidence of a fraudulent kickback scheme, and "[a]lthough Ms. Hoeper was not fired because of the sewer investigation, her exercise of poor judgment in dealing with the investigation, and her predilection to take a scorched-earth path based on instinct and without all the facts, were emblematic of problems that she had demonstrated for years." The City later provided copies of its response to the San Francisco Chronicle and the Westside Observer. On September 5, 2014, the City Attorney's press secretary emailed a Westside Observer reporter and enclosed a copy of the response. "I read with interest your column on former Deputy City Attorney Joanne Hoeper's claim against city taxpayers for monetary damages, and thought you might be interested in the City's formal response to a related claim she filed with the California Division of Labor Standards and Enforcement. It is attached for your perusal, and it was covered in today's Chronicle."

On March 2, 2016, the City moved for summary judgment. Its motion was premised on assertion of the attorney-client

privilege and argued Hoeper could not prove her claims, and the City could not defend against them, without relying on information protected by the attorney-client privilege. The trial court denied the motion, ruling that in her "initial work and reports to City Attorney Dennis Herrera on the sewer investigation," Hoeper "acted in a reporter/investigator role that did not necessarily implicate the attorney-client privilege or attorney work product doctrine; it was this reporting that she claims motivated the city's retaliation against her. [Citation.] Thus, analysis of each individual communication was needed 'to determine whether the dominant purpose behind each was or was not the furtherance of the attorney-client relationship.' [Citations.] But this Court was not provided the information required for such an analysis—e.g., identification of each at-issue communication and its particular circumstances." Relying on *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1191 (*General Dynamics*) the trial court observed that the City's "sweeping notions of privilege would bar most retaliation claims by attorney employees. That is not the law, as illustrated by the California Supreme Court's directive that trial courts apply their 'arsenal' of protective measures (e.g., sealing and protective orders, limited admissibility, in camera proceedings) so attorney plaintiffs can maintain retaliation claims against their employers." The City petitioned this court for a writ of mandate challenging this ruling. We summarily denied the petition and the Supreme Court denied review.

The City renewed its attorney-client privilege argument in motions in limine, asserting the evidence on which Hoeper intended to rely was privileged and confidential. The City argued the court should dismiss the case or, at a minimum, order Hoeper to show she could proceed at trial without divulging privileged information and bar her from introducing any such evidence.

The court found the City had waived the privilege "as to the information published in the newspaper." It therefore denied the motion in limine but reserved ruling on specific exhibits the City identified as privileged in its moving papers. "I want to be able to compare . . . what was said and published in the newspaper. I want to compare them and see if there's something else that shouldn't be disclosed."

B. Analysis

*1. The Summary Judgement Ruling*

Preliminarily, we reject the City's suggestion that the judgment on the jury verdict must be reversed because the trial court erred in denying summary judgment. Even were we to assume the trial court erred,[1] its subsequent determination that the City *waived* the privilege effectively mooted any question of whether the documents and testimony at issue were subject to the privilege in the first instance. "When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial.* Article VI,

[1] To be clear, we reach no such conclusion.

section 13, admonishes us that error may lead to reversal only if we are persuaded 'upon an examination of the entire cause' that there has been a miscarriage of justice. In other words, we are not to look to the particular ruling complained of in isolation, but rather must consider the full record in deciding whether a judgment should be set aside. " (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833, 835-836 (*Waller*).)

The City identifies no such miscarriage of justice, and none is apparent. Although it quotes *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343 (*Dintino*), for the general rule that " [a]n order denying a motion for summary judgment . . . is an interlocutory order that may be reviewed on direct appeal from a final judgment entered after trial," it omits *Dintino*'s qualification that "the appellant must nevertheless show the purported error constituted prejudicial, or reversible, error (i.e., caused a miscarriage of justice). [Citation.] In general, an order denying a motion for summary judgment or summary adjudication does not constitute prejudicial error if the *same question* was subsequently decided adversely to the moving party after a trial on the merits." (*Id*, citing *Waller*, *supra*, 12 Cal.App.4th at pp. 833, 836, italics omitted.) Here, the attorney-client privilege issue was "subsequently decided adversely" to the City at the outset of trial, and the City cannot show the purported error caused a miscarriage of justice. "[M]erely being compelled by force of an erroneous denial of a dispositive pretrial motion to participate in an otherwise fair trial [does not

constitute] prejudice warranting reversal." (*Waller*, *supra*, at p. 834.)

C. The City Waived the Privilege

"In general, when a party asserts the attorney-client privilege, that party has the burden of showing the preliminary facts necessary to support the privilege. [Citation.] The necessary preliminary facts include the existence of the attorney-client relationship at the time the confidential communication was made. [Citation.] After this burden is met, or where there is no dispute concerning the preliminary facts, the burden shifts to the party opposing the privilege to show either the claimed privilege does not apply, an exception exists, or there has been an express or implied waiver." (*Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 102.) Pursuant to Evidence Code section 912, subdivision (a), the attorney-client privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication."

The parties dispute our standard of review. The City argues the relevant facts are undisputed and, accordingly, that we review the trial court's order de novo. (See *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1235-1236 (*McKesson*).) Hoeper asserts the facts are in conflict, so we must review for substantial evidence. (See *DP Pham, LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 664; *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 990.) Both are correct, up to a point. To the extent the facts are disputed we

apply the substantial evidence standard of review. But whether the City disclosed "a significant part" of the privileged communication (Evid. Code § 912, subd. (a)) " 'requires a critical consideration, in a factual context, of legal principles and their underlying values.' [Citation.] Therefore, the question is predominately legal, and we independently review the trial court's decision." (*McKesson, supra,* 115 Cal.App.4th at p. 1236.)

The City asserts there is no waiver under section 912 because it disclosed less than a "significant part" of the privileged communications and "only disclosed publicly six quotations, comprising ten lines of text, from a 27-page report." We see no reason to depart from the trial court's considered decision to the contrary, which is fully supported by the record. As we held in *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1033 (*City of Petaluma*), "[t]he protections of the attorney-client privilege and the work product doctrine may be waived by disclosure of privileged communications or work product to a party outside the attorney-client relationship if the disclosure is inconsistent with goals of maintaining confidentiality or safeguarding the attorney's work product." (*Id*. at p. 1033.) "[T]he employer's injection into the lawsuit of an issue concerning the adequacy of the investigation where the investigation was undertaken by an attorney or law firm must result in waiver of the attorney- client privilege and work product doctrine. . . . As our Supreme Court has held, waiver is established by a showing that 'the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair

adjudication of the action.' " (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 128; *City of Petaluma, supra,* 248 Cal.App.4th at p. 1033.)

Here, the City provided the response it filed with the Labor Commissioner to Hoeper's retaliation claim to two local newspapers. The response provides details of the City's view of the sewer investigation, Hoeper's job performance, and other internal matters concerning her tenure at the City Attorney's Office. It quoted passages from Hoeper's Report and discussed and criticized her investigation at length. It states, for example, that, "[a]lthough rife with innuendo, Ms. Hoeper's claim lacks any *evidence* that anyone in the CAO received kickbacks for approving sewer claims. Early on in the investigation, Ms. Hoeper concluded that Mr. Haase was engaged in wrongdoing. In May 2012, at her first meeting with Dennis Herrera to brief him on the findings of her investigation, Ms. Hoeper voiced her suspicions and called for Mr. Herrera to fire Mr. Haase straight away. Mr. Herrera told Ms. Hoeper to gather facts and not to jump to conclusions without evidence. He then gave her permission to search Mr. Haase's hard drive, review his emails and phone records, and investigate his finances. Ms. Hoeper's investigative team did those things and also interviewed at least 11 City employees, 37 homeowners who had filed sewer claims, and several others. Their investigators also had full access to all past sewer claim files, and covertly reviewed 2012 sewer claims in real time as Mr. Haase was evaluating them.

"The extensive investigation involved three investigators and took over 1,100 hours yet found no evidence of a kickback scheme, as Ms. Hoeper is well aware. As she concluded in the July 18 Report, [¶] 'The preliminary work we have done so far has not revealed the sort of obvious patterns that could be expected if there was a scheme to steer public funds to particular plumbing contractors in return for kickbacks or other benefits. We have **not** found, for example, that homeowners were referred to particular plumbing companies, which one would expect to see if these companies were paying kickbacks or otherwise benefiting individual employees.'

"Commenting specifically on Mr. Haase, the July 18 Report concluded that there was **no** evidence that he 'has a lifestyle or assets beyond what would be expected.' "

Continuing to quote the report, the City stated it "concluded that 'Haase has a reputation for working long hours' and that he is regarded as a 'conscientious, hard-working, and competent employee.' It is unsurprising that Ms. Hoeper has been unable to find any evidence that Mr. Haase was part of a kickback scheme, since he is well-regarded by his peers and by Matthew Rothschild, his supervisor, as a loyal and hard-working City employee." Herrera "refused to allow Ms. Hoeper to continue her scorched-earth investigation against Mr. Haase—again because after a thorough and lengthy investigation she had uncovered no facts to justify further investigation." Hoeper "bungled" the investigation in many ways," "jump[ed] to conclusions before ever speaking with Mr. Haase or Mr.

Rothschild or doing an adequate investigation," jumped to "premature conclusions" and "brazenly demanded that Mr. Herrera fire Mr. Haase, before her team had even interviewed him." Indeed, the City's response denigrated Hoeper professionally, disseminated scathing assessments of her performance as head of the CAO's Trial Team, and in doing so disclosed internal office communications in unrelated legal matters.

On this record there is no valid reason for us to disagree with the trial court's conclusion that the disclosure of these matters to the public was "inconsistent with goals of maintaining confidentiality of or safeguarding the attorney's work product." (*City of Petaluma*, *supra*, 248 Cal.App.4th at p. 1033.) We will not disturb the court's finding that the City waived the attorney-client privilege as to communications related to the sewer investigation.[2]

The City asserts its dissemination of its response to the press did not effect a waiver because it was Hoeper who first violated the privilege when she filed her complaint with the Labor Commission and issued an accompanying press release. Quoting *In re Rindlisbacher* (Bankr. 9th Cir. 1998) 225 B.R. 180, 182 (*Rindlisbacher*), the City argues that "[w]here an attorney violates her statutory duties 'and the attorney client privilege by using the information [s]he obtained while acting as [the City]'s

[2] We therefore do not address the City's alternative arguments that the court erroneously allowed Hoeper to " 'reverse engineer' privileged information by filing record requests aimed exclusively at documents that she knows about by dint of her own privileged investigation and advice."

attorney as the basis for [her] adversary complaint,' responding to the complaint does not waive the privilege." *Rindlisbacher* stands for no such rule. There, rather, the Bankruptcy Court merely declined to extend authority permitting an attorney to employ otherwise confidential client information to collect wrongfully withheld attorneys' fees to counsel's use of such privileged information to oppose his client's pursuit of a bankruptcy discharge. *(Id.* at p. 182.) Nothing in the opinion supports the City's tit-for-tat view, unsupported by any California authority, that the purported disclosure of privileged information in Hoeper's Labor Commission complaint and press release immunized its own subsequent public dissemination of confidential information from effecting a waiver of the attorney-client privilege. The City summarily adds that Hoeper was barred by unclean hands from asserting waiver because her complaint and press release " 'publicly expose[d] the client's secrets.' " This slight elaboration adds nothing of substance to its *Rindlisbacher* argument.

Our conclusion that the trial court properly found the City waived the attorney-client privilege also undermines the City's position that Hoeper's claims are impermissible under *General Dynamics*. In *General Dynamics,* the Court rejected a view that would categorically bar in-house counsel from pursuing actions for retaliatory discharge no matter the circumstances. (*General Dynamics*, *supra*, 7 Cal.4th at p. 1169.) Reconciling the principles underlying the sanctity of attorney-client confidence and the countervailing value of retaliatory discharge claims as a

counterweight to employer malfeasance, the Supreme Court carved out circumstances in which in-house counsel may pursue such claims. As relevant here, if "the conduct in which the attorney has engaged is merely ethically *permissible,* but not *required* by statute or ethical code . . . a court must resolve *two* questions: First, whether the employer's conduct is of the kind that would give rise to a retaliatory discharge action by a *non* attorney employee under *Gantt v. Sentry Insurance, supra,* 1 Cal.4th 1083, and related cases; second, the court must determine whether some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege codified in the Evidence Code (see *id.*, §§ 956-958) specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the 'nonfiduciary' conduct for which he was terminated." (*Id.* at p. 1189.) Such is the case here. A non-attorney employee in Hoeper's circumstances could plainly bring a retaliatory discharge action against the City, and the City's waiver of the attorney-client privilege pursuant to Evidence Code section 912, subdivision (a) authorized Hoeper's use of information that otherwise would have been shielded by the privilege to pursue her claims.[3]

[3] We know of no California case that has recognized a government agency's claim of attorney-client privilege to protect a memorandum of investigation prepared by a government lawyer regarding possible false claims or public corruption, and our research has disclosed none. Rather, a memorandum of investigation is typically protected from disclosure by the conditional privilege for official information in Evidence Code section 1040. (*People v. Jackson* (2003) 110 Cal.App.4th 280,287.) The

California Public Records Act also contains an exemption for records of investigations conducted by local law enforcement agencies. (Gov. Code, § 6254 subd.(f).) But the scope of the exemption is limited, and the identity of witnesses, statements and evidence must generally be disclosed. (*Ibid*.) The attorney work product doctrine provides that "an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (Code Civ. Proc., § 2018.030, subd. (a).) But even the work product privilege is conditional and may not embrace witness statements or the content of any factual investigation when necessary in the interests of fairness. (Code Civ. Proc., § 2018.030, subd. (b); *Uber Technologies, Inc. v. Google, LLC* (2018) 27 Cal.App.5th 953, 969.)

Moreover, while the Public Records Act contains an exemption for drafts of memoranda, the San Francisco Sunshine Ordinance (S.F. Admin. Code, Ch. 67) states that drafts are not exempt from disclosure. (S.F. Admin. Code, § 67.24, subd. (a)(1).) The Sunshine Ordinance also provides that notwithstanding any exemptions provided by law, litigation material that was "previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created" is a public document. (S.F. Admin. Code, § 67.24, subd. (b)(1)(ii).) While the Hoeper Draft Report of Investigation was marked Privileged and Confidential, it is nowhere marked or states that it is subject to the attorney-client privilege.

The San Francisco Sunshine Ordinance makes clear that the People do not cede to elected officials and other agencies of the City and County "the right to decide what the people should know about the operations of local government." (S.F. Admin. Code, § 67.1, subd. (b).) "[T]he right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information." (S.F. Admin. Code, § 67.1, subd. (d).) When records are requested under the Sunshine Ordinance, "[i]n any court proceeding pursuant to this article there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies." (S.F. Admin. Code, § 67.21, subd. (g).) Although the point is moot in light of the City's disclosure of information in the Hoeper report to the media, there is reason to question whether the attorney-client privilege attached to the Hoeper memorandum in the first instance.

Again relying on *General Dynamics, supra,* 7 Cal.4th at p. 1191, the City next contends the trial court should at a minimum have implemented " 'an array of ad hoc measures from [its] equitable arsenal,' " such as sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony, and in camera proceedings, " 'designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege.' " This contention is forfeited by the City's apparent failure to request such measures in the trial court or, if it did so, to identify for this court any such requests by appropriate citation to the trial record. In any event, we take to heart the Supreme Court's observation in *General Dynamics* that the potential for State Bar disciplinary proceedings "will effectively raise the ante on the in house attorney" contemplating a retaliatory discharge action (*ibid*), thereby providing some measure of deterrence against the improper disclosure of truly privileged information.

The City, as we understand it, further suggests the trial court erroneously applied any Evidence Code section 912 waiver beyond the scope of information provided to the newspapers to encompass "the entirety of the draft report of investigation" and "other materials." The City has not shown us that it preserved this objection with regard to any particular testimony or documentary evidence.

"A motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence *and was made at a time when the trial court could determine the evidentiary question in its appropriate context*." (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1675, italics added.) When the court found the attorney-client privilege waived "as to the information published in the newspaper," it reserved decision as to whether specific exhibits the City identified as privileged fell within the scope of the waiver. "[W]ith regard to the specific exhibits, I haven't seen them, and I want to look at them. I want to look at them to see whether or not what's in those exhibits was waived by what was published in the newspaper. [¶] . . . [¶] And if you haven't disclosed it and I don't think it falls within the waiver, then I'm going to exclude it, but I need to see it." The court also deferred ruling on the City's related motion to seal and exclude assertedly privileged material, advising counsel it would resolve the admissibility of the specifically identified evidence on a case-by-case basis during trial.

The City never obtained rulings on those deferred issues. Over the course of the trial the court admitted nearly two dozen exhibits the City's motions in limine identified as privileged, but the City has not provided us citations to the record showing it raised timely, specific objections to their admission. Instead, it relies on *People v. Hall* (2010) 187 Cal.App.4th 282, 292 (*Hall*) to argue it was not required to renew its privilege objections after initially presenting them to the court in its motions in limine. As

stated in *Hall,* "[o]nce an objection has been fully considered and overruled, it is not necessary to repetitiously renew the objection in the same trial to preserve the issue on appeal." (*Ibid*.) But here the court made it clear it would address whether specific items of evidence were protected by the privilege or, alternatively, fell within the scope of the waiver effected by the City's disclosures to the press, during the course of the trial. In context, the City's objections had not been "fully considered and overruled" as they were in *Hall*. (*Ibid*.)

The opening brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) The appellant, who bears the burden of showing an objection was erroneously overruled, "must cite to the record showing exactly where the objection was made. [Citations.] When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made. [Citations.] We can simply deem the contention to lack foundation and, thus, to be forfeited. [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.) The City's appellate briefs also fail to address whether specific exhibits fell beyond the scope of the court's ruling on waiver of the privilege. " '[A]n appellant must present argument and authorities on each point to which error is asserted or else the issue is waived.' [Citation.] Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited."

(*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 599-600.)

**II. Substantial Evidence Supports The Verdict**

California's whistleblower and false claims statutes require the plaintiff to prove that his or her disclosure of protected information contributed to the employer's decision to take an adverse employment action. Once the plaintiff establishes a prima facie case of retaliation for protected activity, the burden shifts to the employer to prove a legitimate, nonretaliatory explanation for its actions. In turn, the plaintiff must prove the employer's explanation is merely a pretext for the alleged retaliation. (Lab. Code, § 1102.6; Gov. Code, §12653; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.)

The City contends the evidence was insufficient to support the jury's finding that Hoeper's sewer investigation was a contributing factor in its decision to terminate her employment. Specifically, it argues there was not substantial evidence that Hoeper was terminated for investigating the sewer claims or that Herrera's professed reasons for terminating her were pretextual.

"When a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review. [Citation.]" (*Wilson, supra,* 169 Cal.App.4th at p. 1188.) Under this standard, "[a]ll conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict." (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) "[W]e do not evaluate the credibility of the witnesses or otherwise reweigh the evidence.

[Citation.] Rather, 'we defer to the trier of fact on issues of credibility. [Citation.]' [Citation.]" (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.) "In short, even if the judgment of the [finder of fact] is against the weight of the evidence, we are bound to uphold it so long as the record is free from prejudicial error and the judgment is supported by evidence which is 'substantial,' that is, of ' "ponderable legal significance," ' ' "reasonable in nature, credible, and of solid value . . . ." ' [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631 (*Howard*).) "Needless to say, a party 'raising a claim of insufficiency of the evidence assumes a "daunting burden." ' " (*Wilson, supra,* 169 Cal.App.4th at p. 1188.)

The City cannot meet that daunting burden. "Actions for unlawful discrimination and retaliation are inherently fact-driven, and we recognize that it is the jury, and not the appellate court, that is charged with the obligation of determining the facts." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389.) Reviewed in accord with the proper standard, the evidence summarized in the preceding discussion section amply supports the jury's factual determinations that Hoeper's sewer investigation was a contributing factor in (Lab. Code, § 1102.5), or substantial motivating reason for (Gov. Code, § 12653), Herrera's decision to terminate her employment. On this record the jury could reasonably find, as Hoeper's counsel argued, that the proffered reasons for her termination were pretextual.

The City's contrary argument and evidence tell a different tale, primarily Herrera's and Stewart's testimony that they initially *supported* Hoeper's investigation; that after her transfer they implemented some of the recommendations in her report and continued some modicum of investigation into some questions it raised; that Herrera harbored a longstanding dissatisfaction with Hoeper stemming largely from her handling of a handful of matters years before the sewer investigation came to his attention; that five years before the transfer he split the Trial Team she headed into two and made her head of one of the new, smaller teams; and that between 2010 and 2012 he explored offering or offered Hoeper's position to various candidates. The City's brief eloquently argues its view that its evidence on these points was stronger or more credible than Hoeper's, just as it did in arguing this case to the jury. But the jurors rejected those arguments and found the evidence supported Hoeper's claims. The evidence, and inferences drawn from that evidence, supporting the jury's findings was " ' "reasonable in nature, credible, and of solid value." ' " (*Howard, supra,* 72 Cal.App.4th at p. 631.) The verdict stands.

## III. Damages

The City argues there was no substantial evidence that Hoeper made appropriate efforts to mitigate damages by seeking other employment. In addition, it contends the jury's assessment of emotional distress damages is excessive and unsupported by substantial evidence. Here too, we must disagree.

### *A. Failure to Mitigate*

"The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.' [Citations.]" (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691.) "The familiar rule requiring a plaintiff in a tort or contract action to mitigate damages embodies notions of fairness and socially responsible behavior which are fundamental to our jurisprudence. Most broadly stated, it precludes the recovery of damages which, through the exercise of due diligence, could have been avoided. Thus, in essence, it is a rule requiring reasonable conduct in commercial affairs." (*Parker v. Twentieth Century-Fox Film Corp*. (1970) 3 Cal.3d 176, 185.)

The burden of proving a plaintiff failed to mitigate damages is on the defendant. (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., USA* (2013) 221 Cal.App.4th 867, 884.) Whether the defendant met that burden is a question of fact subject to review for substantial evidence. (*Ibid*.) The adequacy of the plaintiff's actions depends on the circumstances of the case, taking into consideration time, knowledge, opportunity, and expense. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 466.) "The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight." (*State*

*Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043-1044.)

The City maintains Hoeper failed to mitigate her damages by failing to apply for other comparable or substantially similar jobs.[4] We disagree. The jury heard Hoeper testify about the circumstances that dissuaded her from doing so. She testified that the City's response to her whistleblower claim "trashed me as a lawyer and trashed me as a bad investigator, and that—that document and the article associated with it was the top thing on my Google search." So, "[o]nce I filed my lawsuit and the City filed their documents and gave them to 'The Chronicle,' that was functionally the end of my ability to get a job." Hoeper explained that, although she informally looked for available openings, she refrained from applying for other public law positions because she would have to disclose to prospective employers that she was contemplating a whistleblower suit against the City—in which case it was "common sense" that "the odds of getting that job are zero"—or to conceal her intent, in which case "she's going to be in trouble" once she files suit and her new employer found out.

The City argues this dilemma did not excuse Hoeper's failure to apply for similar employment: "Whatever Hoeper's conscience told her about trying to obtain other employment while contemplating suit against the City, she could not decline to do so without consequence to her claim for damages." But the

[4] For purposes of this discussion, we assume without deciding that the City met its burden of establishing the availability of other comparable or substantially similar employment opportunities. (See *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 255.)

jury reasonably decided otherwise. Hoeper was a high-level supervisor in a high profile public law office. She had been fired by San Francisco's city attorney and was not offered a letter of reference. Officials likely to be involved in hiring decisions for any position substantially similar to her post at the CAO would almost undoubtedly have political and/or working relationships with Herrera or the CAO. Even if Hoeper turned to the private sector, she explained that firms with public entity practices either worked for the City or would be competing for City business. "The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable." (*Valle de Oro Bank v. Gamboa*, *supra*, 26 Cal.App.4th at p. 1691.) Under these circumstances, the jury could reasonably conclude Hoeper was not required to apply for positions for which she was ill-positioned due to this highly public and sensitive dispute and highly likely to be rejected.

*B. Emotional Distress Damages*

Hoeper was awarded $601,630 for past lost earnings, doubled pursuant to Government Code section 12653, subdivision (b), $136,318 for future lost earnings, and $1,291,409 for emotional distress, mental anguish and humiliation, for a total award of $2,630,987. The City contends the emotional distress award is excessive and unsupported by substantial evidence. This contention, too, is without merit.

" '[T]he jury is entrusted with vast discretion in determining the amount of damages to be awarded.' " (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 595.)

"There are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion' [citation]. In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508 (*Seffert*).) "[I]t 'is not the function of a reviewing court to interfere with a jury's award of damages unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice.' " (*Ibid*.)[5]

This case presents no grounds to disturb the award. The loss of Hoeper's position effectively put an end to her 30-year legal career and 20 years at the CAO. After she was fired she "spent a lot of time sleeping too much and drinking too much and sitting around the house. . . ." She no longer received invitations

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[5] Similarly, "a 'trial court's determination [on a motion for new trial based on excessive damages] is to be accorded great weight because having been present at the trial the trial judge was necessarily more familiar with the evidence.' " (*Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1059-1060 (*Ortega*).)

from judges and the Bar to speak on panels. She could not bring herself to attend legal conferences or continuing legal education events. She was isolated from her friends and colleagues at the CAO. She missed the federal and state courthouses where she had spent so much of her professional life. "It was just part of who I was and what I did." Walking into the courthouse made her feel like she was walking through the wreckage of her past. Losing her job like this was "[r]eally, really difficult." She had never in her adult life been without work. "You know, I woke up, and I didn't—I wasn't a lawyer anymore—I mean, at least not a public lawyer anymore, and, you know, time just sort of was in front of me without any—[¶] I mean I didn't know what I was going to do. I was just at loose ends. [¶] It was—it was and is hard." On this record the damage award does not " 'shock[] the court's sense of justice [or] raise[] a presumption that it was the result of passion and prejudice.' " (*Seffert, supra,* 56 Cal.App.2d at p. 508.)

The City's reliance on cases in which juries awarded lesser amounts on different facts (see, e.g., *Sasco Electric v. Cal.Fair Employment and Housing Com*. (2009) 176 Cal.App.4th 532, 540; *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 410; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803) does not aid its attempt to persuade first the trial court and now this panel that the award was excessive. "While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such

awards vary greatly." (*Seffert, supra,* 56 Cal.2d at p. 508.) "The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 fn.12.)

Pointing to Hoeper's testimony that it was painful for her to come to the courthouse for the trial and her counsel's jury argument about the "brutal[ity]" of the City's response to her claim, the City contends the jury improperly inflated its award to compensate Hoeper for emotional distress resulting from the whistleblower litigation. (See *Ortega, supra,* 64 Cal.App.4th at p. 1060 [" 'litigation stress' " is legally noncompensable].) The City forfeited this argument by failing to raise that objection when Hoeper testified about her discomfort attending the trial or during counsel's argument. In any event, the argument is unpersuasive. Hoeper is entitled to the benefit of every inference that reasonably may be drawn from the record. (*Seffert, supra*, at p. 508.) The jury could well have viewed Hoeper's testimony about her anguish coming to the courthouse as illustrative of the pain caused by her estrangement from her professional life and not as an independent basis for emotional distress damages.

## IV. Attorneys' Fees

The City conditionally challenges the fee award to Hoeper's counsel, asserting only that we must reverse it if the City prevails on any of its other appellate claims. It has not, so we will not.

## DISPOSITION

The judgment is affirmed.

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Siggins, P.J.

WE CONCUR:

_____
Fujisaki, J.

_____
Jackson, J.